U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10Apr2002

Case No. 2000-LHC-03261

OWCP No. 1-149437

In the Matter of

DAMON E. CUNNINGHAM, JR.,

Claimant,

v.

BATH IRON WORKS,

Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest.

Appearances[1]:

Marcia Cleveland, Esq.
Brunswick, ME
For the Claimant

Stephen Hessert, Esq.
Norman, Hanson, & DeTroy
Portland, ME
For the Employer

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

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[1] The Director, OWCP was not represented by Counsel at the hearing.

DECISION AND ORDER - DENIAL OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (herein after referred to as either LHWCA or the Act).

On September 13, 2000, this case was referred to the Office of Administrative Law Judges by the Office of Workers' Compensation Programs for a hearing. Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on April 26, 2001, in Portland, Maine. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. At the conclusion of the hearing, the record was left open for 14 days for submission by the Claimant of two exhibits I requested. By cover letter dated May 9, 2001, the Claimant has submitted Claimant's Exhibits 32 and 33, which consist of a zoning map and zoning legend of the subject property and surrounding area and a United States Geological Society quadrangles map of Brunswick and Bath, Maine. On June 12, 2001, the parties filed a joint motion asking that simultaneous post-hearing briefs be due on August 2, 2001. This request was granted on June 20, 2001. Two extensions of time were subsequently granted and briefs were finally due on September 28, 2001. The Claimant filed a petition for an Award of Attorney's Fees on November 14, 2001.

The Findings of Fact and Conclusions of Law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX 1 through 2, CX. 1 through 33, and EX. 1 through 86 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Claimant, and the Employer, respectively. The transcript of the hearing is cited as "Tr." followed by page number.

STIPULATIONS:

At the hearing, the parties submitted the following stipulations (Tr. 16):

1. The Claimant and the Employer were in an employee-employer relationship at the time of the injury;

2. The accident/injury arose out of and in the scope of employment.

3. The accident/injury occurred on October 1, 1999.

4. The occupational injury became manifest to the Employer on October 4, 1999.

5. The Claimant gave the Employer timely notice of his injury;

6. The Claimant filed a claim for compensation on March 30, 2000;

7. The Claimant's claim was filed in a timely fashion;

8. The Employer filed timely notice of contraversion of this claim;

9. The Claimant was, at all relevant times, a maritime employee;

10. The Employer is a maritime employer;

11. The Claimant received benefits pursuant to the State of Maine Workers' Compensation statute; and,

12. All medical bills of the Claimant have been duly paid by the Employer.

ISSUE:

The issue in this case is whether the Act (33 U.S.C. §901 *et seq.)*, applies to this claim, i.e. whether the situs element required for jurisdiction is satisfied by the record evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

In this claim for benefits, the Claimant, Damon E. Cunningham, seeks permanent partial disability benefits for a back injury he sustained in a work-related accident.

The Claimant, who was fifty-two years old at the time of the hearing, began working at Bath Iron Works (hereinafter "BIW") in

1978, as a pipe fitter. (Tr. 30-31) Prior to accepting employment with BIW he was employed as an electrician. (Tr. 31) Approximately two years before the accident, which is the subject of this claim, the Claimant was transferred from the main shipyard in Bath, Maine, to BIW's East Brunswick Manufacturing facility (hereinafter "EBMF"). (Tr. 32) On October 1, 1999, he was working with a welder when he reached down to pick up a piece of pipe. (Tr. 32) The Claimant stated he reached down and twisted his body in one motion and then felt a "crunch" in his back. (Tr. 32) At the time, he thought he had pulled a muscle. (Tr. 32) He further testified he was unable to get out of bed the next morning due to pain. (Tr. 32) He sought medical treatment within a week and was told by Dr. Michael Doyle, a nuersosuregon, that he has suffered a "tremendous back strain." (Tr. 33) The Claimant was off from work for three months and has continuing back problems. (Tr. 33)

The only issue to be decided in this matter is whether the EBMF facility where the Claimant was injured is a covered situs under the Act. EBMF is one of five BIW owned and operated facilities in Brunswick, Maine. (Tr. 41-44; 51-55; 86-88) The EBMF facility is located 3.5 to 4.5 miles to the west of the main shipyard. (Tr. 94; 95-97) The Claimant avers that the EBMF facility may be characterized as an area "adjoining" the "navigable waters of the United States" pursuant to 33 U.S.C. §903(a), and, thus, claims jurisdiction under the Act. The Employer argues that EBMF is not situated upon or adjoining a navigable water way of the United States, and, therefore, the requirements for jurisdiction are not satisfied.

Earl Flanders, a business agent for the National Association of Machinists, a labor union at BIW, testified on behalf of the Claimant. Mr. Flanders began working at BIW in 1987, and has been affiliated with the Union since late 1989. (Tr. 36) He testified that the EBMF facility began operations in late 1989 or early 1990. (Tr. 36) Employees of EBMF prefabricate units of pipe which are then transported to the BIW main shipyard in Bath, Maine, where they are installed on ships. (Tr. 37) When EBMF first opened, the facility was staffed by senior BIW personnel and injured employees of the pre-fabrication shop then located at the main shipyard. (Tr. 38) Currently, EBMF is staffed by some senior pipefitter employees; however, the vast majority of employees at EBMF are workers who were previously injured. (Tr. 40) Approximately 150 to 200 union members are currently employed at EBMF. (Tr. 42)

A member of the Brunswick Planning Board and a historical consultant, Mr. Edward Hawes, testified as to the geography of the Brunswick area, as well as historical developments and land use patterns in the local area. (Tr. 44) In preparation for his

testimony, Mr. Hawes reviewed materials he had previously prepared including a study of shoreline access done in 1985 and a report he had drafted for the Bath Water Front Committee. (Tr. 46) Mr. Hawes also examined records of relevance at the Brunswick-Bowdoin College library, files of the Planning Board, maps, and summaries of deed records for BIW properties. (Tr. 47)

Mr. Hawes explained that BIW operates 5 separate facilities on properties along Bath Road west of the New Meadows River in Brunswick, Maine. (Tr. 51) The Bath Road runs east to west. (Tr. 51-55, CX. 18, 20) These facilities include the "Hardings" facility, the "DD2" facility both of which are situated north of Bath Road, the "Consolidated Warehouse" facility, EBMF, and the "James" facility (AKA: Surface Ship Support Center), all three of which are located south of Bath Road. (Tr. 51-55) EBMF and the Consolidated Warehouse facility both lie on the same parcel of property, a roughly 60 acre tract of land, across the road from the Hardings building. (Tr. 51-55, 85, CX. 18, 22) The James facility is on the south side of Bath Road and west of the EBMF/Consolidate Warehouse property. (Tr. 55) The building known as DD2 is located on the north side of Bath Road and west of the Hardings facility. (Tr. 55) All five BIW buildings are located within an "I-3" industrial zone which permits businesses in excess of 20,000 square feet and twenty-five or more employees. (Tr. 56)

To the east of the BIW properties, but not directly adjacent to those properties, lies the New Meadows River. (CX. 18, 22) Mr. Hawes testified that a small waterway known as Thompson Brook flows south out of a salt water marsh area (Thompson Marsh) located north, northwest of the subject property. (Tr. 54, 101) A small portion of that marsh lies on the northwest corner of the subject property and Thompson Brook itself crosses the subject property at its southwest corner. (Tr. 101, CX. 18, 22) Thompson Brook flows north to south, crossing under Adams Road by means of a culvert, and eventually spills into Thomas Bay. (Tr. 114-116) A dam was built on the northern part of the Brook and was used to hold back water into two ponds. (Tr. 123) These ponds were used as one of the two primary water sources for the City of Bath, Maine, until 1970. (Tr. 123)

Mr. Hawes testified that at the point Bath Road crosses the New Meadows River there is a marina and a propeller shop. (Tr. 56, 75) Commercial lobstering is practiced on the River to the south of the Bull Rock Bridge which is located to the far south, southeast of the subject property. (Tr. 76) Two aquiculture oystering operations are located on the River just north of the Bath Road crossing. (Tr. 76) Mr. Hawes was also aware of some commercial elvers and smelt fishing practices occurring on the river. (Tr.

78) Land uses of properties west of the subject parcel but east of the area of Brunswick known as Cooks Corner included commercial businesses such as a movie theater, driving range, and auto dealership and a few residences. (Tr. 88-89) Land uses located on the properties south and east of EBMF and on the properties between EBMF and the north-south running Hardings Road include a non-conforming commercial greenhouse and a few residences. (Tr. 92-93) Several small businesses and residences are also situated on either side of Hardings Road. (Tr. 94)

Mr. Hawes opined that the salt water marsh north of the subject property might have once been used for harvesting salt hay for feeding and bedding local livestock. (Tr. 81) He stated this was a common practice in the Maine costal regions from 1850 through the 1870's. (Tr. 81) However, he admitted on cross- examination that he had not found any specific reference discussing such a practice at Thompson Marsh. (Tr. 103) Furthermore, he stated that he had found no record of any public access to Thompson Brook anywhere north of Adams Road, which would include all portions of the Brook on or near the subject property. (Tr. 104)

Also testifying on behalf of the Claimant was Thomas Burns, a private consultant, GIS AcrInfo analyst. (Tr. 132) Mr. Burns explained that AcrInfo is a computer software program that utilizes GIS (Geographic Information Systems) to create computer-generated digital maps. (Tr. 132) Using a variety of map input sources, the program is able to generate series of maps which can be digitally overlaid to get a picture of land use developments over time. (Tr. 134-137)

Included in the Claimant’s exhibits are nine maps Mr. Burns generated of the subject area. (CX. 18) He testified that he used the following five data sets of information to create those maps: 1.) The National Wetlands Inventory; 2.) The Maine Geological Survey Coastal Marine Geological Environment map; 3.) Two U.S. Geological Survey maps (one from 1890 and one from 1978); 4.) The James W. Sewell Company 1990 Land Cover Map; and 5.) A digital composite overlay tax map of Brunswick. (Tr. 149; CX. 18) All of the data sets, except the James W. Sewell set, were originally created by a state or federal agency. (Tr. 149) The James W. Sewell Map was created by the James W. Sewell Company, a business which specializes in land cover typing. (Tr. 149) In creating these exhibits, Mr. Burns took one of two U.S. Geological Survey Digital orthophotos and used the AcrInfo software to digitally “overlay” one or more of the other data sets onto these photos. (Tr. 149-150) He explained that the orthophotos were of the same geographic area, but were taken at two different times. (Tr. 150)

Mr. Burns explained that the map labeled “EBMF1" was an orthophoto of the subject area taken on May 5, 1996, with the Brunswick Digital composite Tax map overlaid on top of it. (Tr. 150, CX. 18) In the “EBMF2" photo, Mr. Burns overlaid a third data set, the Maine Geological Survey Coastal Marine Geological Environment map, onto EBMF1. (Tr. 152, CX. 18) Marine environments, including the Thompson Brook and the New Meadows River, are indicated by green shading on this photo. (Tr. 152, CX. 18) Mr. Burns also labeled two specific marine environments which, according to the Maine Geological Survey Coastal Marine Geological Environment map, can be found on Thompson Brook. (Tr. 152, CX. 18) Designated by the abbreviation “SM”, Fresh-Brackish Marsh areas are located south of the subject property. (CX. 18) Mr. Burns testified that Fresh-Brackish Marsh refers to marine environments with salt water contents of a varying degree. (Tr. 152, CX. 18) Designated by the abbreviation “M1", High Salt Marsh areas can be seen on the Brook south of the Fresh-Brackish Marsh areas. (Tr. 152, CX. 18) High Salt Marsh areas, Mr. Burns explained, refer to environments more saline in nature. (Tr. 152) At the hearing, Mr. Burns drew a red line on this exhibit indicating the point of separation between these two environments. (Tr. 155 CX. 18) He also explained that SM areas fall under the category supra tidal, while M1 areas are intertidal in nature. (Tr. 156) The Maine Geological Survey Coastal Marine Geological Environment map Key included with the EBMF1 photo overlay states that supra tidal environments are environments just above the highest high water datum, but under the partial influence of marine processes and forces. (CX. 18) The key defines intertidal environments as those between the highest high water datum and the lowest low water datum subject to twice daily tidal flooding and all other marine forces. (CX. 18)

“EBMF3" is a close-up orthophoto of the subject property taken on May 7, 1996. (CX. 18) Overlaid on it is the Maine Geological Survey Coastal Marine Geological Environment map, the digital tax map, the 1978 U.S. Geological Survey map, and the James W. Sewell Company 1990 Land Cover Map. (CX. 18) The James W. Sewell Company 1990 Land Cover Map data is indicated in purple and shows an area of “Shrub Swamp” on the western vertex of the property, and an “Estuary and Salt Marsh” south of the property line. (Tr. 157, CX. 18) A red line, representing data from the U.S. Geological Survey, demonstrates a “perinnial stream” running north to south and crossing the subject property of the western vertex. (Tr. 157, CX. 18)

“EBMF4" is a historical 1890 U.S. Geological Survey Map of the subject area. (Tr. 159, CX. 18) Overlaid onto it is both an outline of the subject property and the Maine Geological Survey

Coastal Marine Geological Environment map, (Tr. 159, CX. 18) Mr. Burns states that the 1890 map shows an old water course crossing the subject property further to the east than the present-day Thompson Brook. (Tr. 159)

Using EBMF 1 through 4 as guides, Mr. Burns testified that the Thompson Ponds are the fresh water source of the Brook which flows north to south into the Thomas Bay. (Tr. 160) Part of the Brook is also somewhat influenced by the tides in that, during high tide at Cosco Bay, salt water from the Atlantic Ocean flows south to north into the Brook powered by the force of that high tide and mixes with the north to south flowing fresh water. (Tr. 160)

"EBMF5" is the National Wetlands Inventory Map of the subject area with the digital tax map overlaid. (Tr. 161, CX. 18) This exhibit shows the existence of four U.S. Fish and Wildlife Service designations present on the subject property. (Tr. 161, CX. 18) Green shading indicates an "Emerging Persistent & Regularly Flooded" classification at the southwestern vertex of the property and extending south from the subject property. (Tr. 161, CX. 18) Pink shading on the southwestern vertex indicates an area of "shrub scrub". (Tr. 161, CX. 18) Orange shading demonstrates a small sliver of "Forested Wetlands" area on the BIW property. (Tr. 161, CX. 18) Finally, brown shading is indicative of ponds on the northwestern vertex of the subject property. (Tr. 161, CX. 18)

"EBMF6" is a close up view of the historical 1890 U.S. Geological Survey map of the subject area. (Tr. 162, CX. 18) The modern-day subject property is outlined in red and the 1978 U.S. Geological Survey map is overlaid. (Tr. 162, CX. 18) A blue line demonstrates the location of a stream running through the subject property in 1890. (Tr. 162, CX. 18) A brown line, approximately 250 feet further west than the blue line, shows the modern day location of Thompson Brook on the subject property. (Tr. 162, CX. 18)

"EBMF7" is an orthophoto of the subject area with an overlay of the Maine Geological Survey Coastal Marine Geological Environment map. (Tr. 162, CX. 18) Thompson Brook and the New Meadows River are outlined in green. (Tr. 162, CX. 18) This particular exhibit shows the intersection of Thompson Brook, the Thomas Bay, and the New Meadows River approximately a mile south of the subject property. (CX. 18)

"EBMF8" is a U.S. Coast and Geodetic Survey of the subject area from 1941. (Tr. 162, CX. 18) The subject property is outlined in green. (CX. 18) The exhibit shows an area of marsh land south of the BIW property line. (CX. 18) This map also indicates a

distance of approximately 1400 feet from the subject properties' southeast vertex to the New Meadows River. (CX. 18) The map further illustrates a distance of 3400 feet from the subject properties' southern vertex to the mean high tide line. (CX. 18) "EBMF 9" is a plain orthophoto of the subject area. (CX. 18)

Mr. Burns testified that, in his opinion, the Thompson Marsh is "extremely close" to being tidal in nature. (Tr. 167) Based upon the data sets he examined and the Employer's exhibits he reviewed, he felt the Marsh was tidal or at least tidally influenced to a point well north of the point indicated on EBMF8. (Tr. 167) He opined the tidal influence extended to very near the BIW southern property line, if it in fact did not cross the property line. (Tr. 167)

On cross-examination, Mr. Burns testified that he never actually went out to the BIW property or personally observed the areas for which he created GIS maps. (Tr. 190) All his data came from the various sources enumerated above. (Tr. 190) He also testified that he used the Brunswick tax maps as the overlay to identify the property boundaries in the area. (Tr. 190) There is a disclaimer on tax maps that states the boundary lines as indicated on the map are not to be used for conveyances. (Tr. 191) Only a survey of a particular parcel of property can accurately define the property boundaries. (Tr. 191) Mr. Burns opined however that tax maps have a ten foot plus or minus degree of accuracy regarding actual property lines. (Tr. 194) Mr. Burns also testified that the 1890 U.S. Geological Survey map he had used was originally a hand-drawn map and not as accurate as the newer maps he used which were created by more technologically advanced systems. (Tr. 196)

Mr. David Kamila, a land use consultant and certified civil engineer, testified on behalf of the Employer. (Tr. 224-225) Mr. Kamila stated that he is the owner of Land Use Consultants, Inc., a land-use planning firm in Portland, Maine, that specializes in land planning, engineering, landscape, and architectural design for public and private entities. (Tr. 224)

Mr. Kamila stated that he had made several visits to the BIW property in question and had walked along the banks of Thompson Brook taking photographs on several occasions. (Tr. 226-227) He was able to specifically locate the BIW property boundaries with the aid of both an aerial photograph of the area and the results of a survey done by a licensed surveyor. (Tr. 227) The opinions he gave at the hearing were based upon his personal observations and experience as well as the survey, Brunswick Wetlands maps and Brunswick zoning maps and the Brunswick zoning regulations. (Tr.

229-230)

The zoning maps and regulations he reviewed showed that the area of Thompson Brook flowing on the subject property is located within a "Resource Protection Zone." (Tr. 230) He opined that the town of Brunswick would be "very opposed" to any proposed plan to disturb property located within such a zone including plans to improve the stream bed to the point of navigability. (Tr. 232) In fact, such plans would require the approval of the Brunswick City Government, the U.S. Department of Environmental Protection (hereinafter "DEP"), and the U.S. Army Corp of Engineers. (Tr. 232) All three of those entities have overlapping jurisdiction of the subject area. (Tr. 232) Mr. Kamila testified that in order to qualify for a DEP permit, one would have to demonstrate there were no other feasible alternatives than the ones being proposed and that the DEP would not consider cost in assessing feasability. (Tr. 233)

Based upon his personal observations, Mr. Kamila testified there were no current commercial uses of the Thompson Brook from the BIW property line to Adams Road culvert. (Tr. 233) He also did not observe any commercial uses of the ponds or marshy areas at the north BIW property line at Bath Road. (Tr. 234)

Mr. Kamila also stated he could did not discern a tidal influence on the portions of Thompson Brook located on the subject property. (Tr. 235) Using the tide tables published by the National Oceanographic and Atmospheric Administration, he visited the portion of the Brook crossing the subject property and crossing Adams Road several times both at high and low tide. (Tr. 235, EX. 64) Regardless of the tide, Mr. Kamila stated the water on BIW property always flowed north to south. (Tr. 237) He observed, however, a distinct tidal influence on the Brook at the Adams Road culvert. (Tr. 239) On one such visit, he measured the culvert and testified it was six feet in diameter. (Tr. 238) Mr. Kamila also reported that on one visit to the subject property he observed the water level of the Brook was actually lower during the high tide cycle than it had been during the low tide cycle. (Tr. 245) He also measured the depth of the Brook at the BIW property line during a high tide cycle and found it to be approximately a foot deep. (Tr. 248)

Mr. Kamila stated that after his visits to the area, he came to believe that the portion of Thompson Brook flowing on the subject property was not tidally influenced. (Tr. 250) However, he felt an official survey was necessary to be certain, particularly since some tidal activity could be masked by melting snow runoff. (Tr. 250)

At Mr. Kamila's suggestion, a survey of the subject property was conducted on April 23, 2001. (EX. 65) Mr. Kamila testified that he contacted the survey company, accompanied the survey crew to the south BIW property line, and instructed them as to what elevation measurements were needed. (Tr. 252) The record includes a letter dated April 24, 2001, addressed to Mr. Kamila, from Timothy A. Patch, the president of Survey & Geodetic Consultants, Inc., regarding the findings of the survey. (EX.65) Surveyors determined the elevation of the channel of Thompson Brook at the approximate intersection of the south BIW property line was 10.9 feet (MLLW). (EX. 65) Mr. Kamila testified that the record means high tide at Howard Point (the closest established tide table reference point), which is located at the mouth of Thompson Brook before it pours into the New Meadows River, is calculated to be only 9.35 feet. (Tr. 259) Therefore, Thompson Brook at its deepest point on the BIW property is 1.55 feet higher than the average high tide at Howard Point. Because the height of the tide diminishes as it travels north from Howard's Point toward the Employer's property, Mr. Kamila concluded that the portion of the Brook on BIW's property is above the mean high tide level, and therefore not tidally influenced. (Tr. 257-59)

The parties have also included substantial medical records relating to the diagnosis, treatment, and care of the Claimant's back condition. (CX. 9, 10, 11, 12, 13, 14, 15; EX. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21) As the parties have stipulated to all issues in this case other than coverage under the Act, it is unnecessary to summarize these voluminous medical reports.

Discussion:

Jurisdiction under the Act requires that a Claimant establish the elements of maritime "status" and maritime "situs". See generally Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). In the present claim, the parties have stipulated that status under the Act has been satisfied. Situs refers to the place at which an employee worked or was injured. Specifically, situs requires that a Claimant's disability

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. §903(a). The issue in this case, therefore, is whether EBMF is a facility adjoining a navigable water way of the United

States.

At the outset, I note that the Employer in this case objects to the testimony given by and the exhibits created by Thomas Burns on the grounds his testimony and exhibits are not qualified expert evidence and are not relevant. Employer's Brief at p. 11. The Claimant has also lodged an objection to the admissibility of Employer's Exhibit 65 - a survey performed by Survey and Geodetic Consultants, Inc., and the portion of David Kamila's testimony regarding that survey on the grounds of late submission, hearsay and lack of expertise. Claimant's Brief at p. 7. For the reasons discussed below, the objections of both parties are noted and overruled.

It is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony, according to his judgment. Perini Corp. v. Hyde, 306 F. Supp. 1321, 1327 (D.R.I. 1969). The Board will not interfere with credibility determinations made by an administrative law judge unless they are "inherently incredible and patently unreasonable." Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13 (1978).

If scientific, technical, or other specialized knowledge will assist the judge, a witness qualified as an expert may testify and render an opinion. 29 C.F.R. § 18.702. It is the burden of the proponent to establish the expertise of the witness. Whether the witness is sufficiently qualified as an expert is decided by the judge. 29 C.F.R. § 18.104. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993), the Supreme Court held, in part, that Rule 702 of the Federal Rules of Evidence superseded the Frye Rule (Frye v. United States, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923)), which had been the dominant standard for determining admissibility of "scientific evidence" in federal court before the adoption of the Federal Rules of Evidence. The Court in Daubert held that trial judges may qualify testimony and evidence as “expert” only if that evidence or testimony is relevant and reliable. Daubert, 113 S. Ct. 2795. “Proposed testimony must be supported by appropriate validation i.e., good grounds, based on what is known”, and trial judges must determine that the proposed evidence “fits." Id. at 2759, 2796. In other words, the evidence or testimony must "assist the trier of fact to understand the evidence, or to determine a fact in issue." Fed. R. Evid. 702. Once a judge determines that the proposed evidence is supported by appropriate validation and determines that the testimony would assist in determining facts in dispute, it is expected to apply a flexible five-part test to establish admissibility. The elements of the test are:

1. Whether the theory or technique in question can be (and has been) tested;

2. Whether it has been subjected to peer review and publication;

3. The theory or technique's known or potential error rate;

4. The existence and maintenance of standards controlling the theory or technique's operation; and

5. Whether the theory of technique has attracted widespread acceptance within a relevant scientific community.

Id. at 2790.

Applying Daubert, I find that the maps created by Mr. Burns and offered as Claimant's Exhibit 18, may be qualified as expert evidence. These maps are clearly relevant to these proceedings as they relate to the nature and types of environments located on Thompson Brook. A significant portion of this case hinges upon whether that Brook is a navigable waterway of the United States. The GIS overlay maps created by Mr. Burns illustrate the present ecological environment of the Brook and the surrounding area. Knowing what those environments are will significantly assist in determining if Thompson Brook is navigable.

GIS mapping is a reliable, widely accepted system that is in fact utilized by the U.S military. (Tr. 141) The specific GIS program used by Mr. Burns, ArcInfo, is used by many Federal Agencies as their standard GIS program. (Tr. 145) The map-overlay process which is the basis of modern day GIS mapping has been in use for a significant period of time having been first developed in the 1950s. (Tr. 135) Computer technology has brought accuracy and dependability to the field. (Tr. 136) Furthermore, the input data Mr. Burns used to generate his overlay maps was created originally by federal and state entities or by private companies who are recognized as reliable experts in this field.

Mr. Burns admitted on cross-examination that the tax maps he used to establish property boundary lines on his orthophotos of the subject area contain a disclaimer that they are not to be used for purposes of conveyance as the maps do not show precise property boundaries. (Tr. 190, 193-194) However, the instant case does not involve a conveyance of property or any other claim for which the exact position of a property line as referenced by geographic landmarks would require. The maps identify the general boundaries of water courses in issue and the nature of ecological environments adjacent to those water ways. There relative degree of accuracy as to the BIW property lines is within an acceptable margin of error for purposes of this case.

Mr. Burns is a GIS analyst and he may therefore be qualified under Daubert as an expert witness in the applications of this field because GIS is a field of technical specialty which Mr. Burns has shown himself an expert by virtue of his experience, training, knowledge and skill. (Tr. 133-134, 137-141) Specifically I find that his testimony relating to the GIS process and how he created the specific maps offered as Claimant's Exhibit 18 is admissible as expert testimony. I note, however, that his personal opinion to whether or not Thompson Brook is tidal, cannot be qualified as an expert opinion under Daubert. Mr. Burns is not a surveyor, engineer, or oceanographer, and he has not demonstrated any experience, training, education, skill or knowledge in such areas. As such, he cannot be qualified as an expert witness in any field other than GIS mapping.

The fact that Mr. Burns did not perform actual "field work" in generating his maps and that he is not a licensed surveyor or engineer are not sufficient rationales for excluding his exhibits or the bulk of his testimony. A GIS analyst is a profession which does not require licensure or experience as a surveyor or engineer, but experience and knowledge with the GIS system. Mr. Burns's testimony regarding his work experience demonstrates that he has the requisite knowledge and experience in GIS mapping to be qualified as an expert in that field. (Tr. 133-134) Based upon his description of the GIS mapping process and GIS software analysis, uncontroverted by the Employer, it appears field work (i.e. actually visiting or surveying the sites in question) is not a routine part of a GIS analysts job. In fact, if he had conducted surveys and based his testimony and exhibits on such, he could not be qualified as an expert because he has no experience or training in the fields of surveying or engineering. Therefore, for the reasons explained above, I find that the exhibits created by Mr. Burns and located at Claimant's Exhibit 18, as well as the bulk of Mr. Burns's testimony qualify as expert under Daubert.

As I did at the hearing, I once again overrule the Claimant's objection to the testimony of Mr. Kamila regarding the survey conducted by Survey & Geodetic Consultants Inc. as hearsay. Furthermore, I again overrule the Claimant's objection to the survey itself.

Hearsay evidence is generally admissible in administrative proceedings if it is found to be reliable. See Richardson v. Perales, 402 U.S. 389 (1971). As hearings before administrative law judges follow relaxed standards of admissibility, the admission of evidence depends on whether a reasonable mind might accept it as probative. Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969). Hearsay evidence, where it possesses

rational probative force, may constitute substantial evidence to support an administrative finding. Camarillo v. National Steel & Shipbuilding Co., 10 BRBS 54, 60 (1979).

In the present case, I find Mr. Kamila's testimony regarding the survey performed by Survey & Geodetic Consultants Inc., reliable. Mr. Kamila is a land-use consultant by trade with over twenty years of experience in this area and is a registered engineer in the states of Maine and New Hampshire and licensed site-evaluator in the state of Maine. (Tr. 223-224, 225; EX. 86) The survey itself was done on his request so that he would be able to compare his observations regarding tidal influence on Thompson Brook with the actual tide table datum. (Tr. 250) Furthermore, Mr. Kamila accompanied the surveyors to the subject area, identified the property line of BIW, and instructed the survey crew as to type of information needed. (Tr. 251) He therefore has the knowledge, experience, and expertise to testify about the results of this survey. Furthermore, because Mr. Kamila was called as a witness at the hearing, the Claimant's right of cross-examination has been preserved.

I also find that the survey itself is admissible in this case. In brief, the Claimant states that the objection is based on the grounds the survey was not provided to the Claimant until the day before the hearing and that he did not have a fair opportunity to cross-examine the surveyor who performed the survey. Claimant's Brief at p. 7.

The Notice of Hearing in this case instructed the parties to develop and exchange their evidence with one another 45 days prior to the hearing. (ALJX. 1) Rebuttal evidence was also required to be exchanged prior to the hearing, however no specific time frame for exchange of rebuttal evidence was allotted for in the Notice of Hearing. (ALJX. 1) I find that the survey in dispute was evidence offered in rebuttal to the exhibits and testimony of Mr. Burns and because the Claimant did receive the survey prior to the hearing, the dictates of the Notice of Hearing have been satisfied. Furthermore, because the survey was performed by an independent, unbiased third-party and the report is consistent on its face, I find it qualifies as an ex parte report. In general, ex parte reports are admissible where the author is not biased and has no interest in the case, the opposing party has the opportunity to subpoena or cross-examine the witness, including post-trial, and the report is not inconsistent on its face. Darnell v. Bell Helicopter Int'l, 16 BRBS 98, 100 (1984), *aff'd sub nom.* Bell Helicopter Int'l v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984). See also Feezor v. Paducah Marine Ways, 13 BRBS 509 (1981). I note that in the present case, the Claimant could have

requested the record be left open post-hearing so that he could cross-examine the surveyor by deposition. The Claimant's counsel was specifically asked at the close of the hearing if she had any additional exhibits to submit to which she replied "no." (Tr. 280) Therefore, I find that this is not a case where there was no opportunity for cross-examination, but a case where the opportunity was not sought by counsel for the Claimant. As such, the survey is admissible.

The original Longshore Act, passed in 1927, contained a geographic definition for covered situs. Benefits were available for those employees who suffered an injury upon the navigable waters of the United States or at areas on the "waters edge." 33 U.S.C. §903; Southern Pacific Co. v. Jensen, 244 U.S. 205 (1971). In an effort to extend coverage of the act landward, Congress amended the definition of "situs" in 1972 to include areas adjoining the navigable waters of the United States. 33 U.S.C. §903(a).

A threshold question which must be answered prior to assessing whether EBMF is an "adjoining" facility is whether Thompson Brook is in fact a "navigable" water of the United States. The Act does not specifically define the term "navigable waters". Therefore, for purposes of LHWCA jurisdiction, the term "navigability" derives from Admiralty law. In The Daniel Ball, 77 U.S. 557 (1871), the United States Supreme Court stated that "the rivers of the United States must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of travel on water." See also The Montello, 78 U.S. 411 (1871); LePore v. Petro Concrete Structures, Inc., 825 F.2d 246 (9th Cir. 1987).

Navigability for purposes of the LHWCA depends on actual present navigation or susceptibility to future navigation with reasonable improvements. Three Buoys Houseboat Vacations. LTD. v. Morts, 878 F.2d 1096, 1099 (8th Cir. 1989), *vac'd*, 497 U.S. 1020, *adhered to on recon.*, 921 F.2d 775 (8th Cir. 1990), *cert. denied*, 502 U.S. 898; Land & Lake Tours v. Lewis, 738 F.2d 961 n.3 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984); Livingston v. U.S., 627 F.2d 165 (9th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); Adams v. Montana Power Co. 528 F.2d 437 (9th Cir. 1975) George v. Director, OWCP, 86 F.3d 1162 (Table) (9th Cir. 1996); Chapman v. U.S., 575 F.2d 147 (7th Cir.) (En banc), *cert. denied*, 439 U.S. 893 (1978).

Based upon the evidence of record, I find that Thompson Brook,

north of Adams Road and including the portion of the Brook on the subject property, is not presently navigable. The record demonstrates that the part of the Brook extending from Thompson Marsh, south to the Adams Road and crossing the subject property is a narrow, shallow channel of water with many sharp meandering turns. (CX. 18, 21, 22 EX. 23, 31, 32, 35, 57, 58) The Brook flows under the Adams Road by means of a 6 foot wide metal culvert. The narrowness of this culvert simply makes commercial boat navigation of the Brook for its entire length feasibly impossible. (EX. 68-78) The testimony of records also establishes that commerce, in any form, is not presently conducted on Thompson Brook and no specific evidence was offered establishing a historical pattern of commerce on the Brook. (Tr. 233, 234) While Mr. Hawes speculated that salt marsh hay may have once been harvested from the area, he could not point to any historical record or text corroborating that speculation. (Tr. 81, 103)

In Solid Waste Agency of Northern Cooks County v. U.S. Army Corp of Engineers, 531 U.S. 159, 172, the Unites States Supreme Court held that a body of water may be found to be navigable in fact if, with reasonable improvements, it can be made suitable for commercial use. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408 (1940). The Claimant therefore argues that because canals had been built in the surrounding area linking other marshes and small streams to the New Meadows River, such a canal could now be built involving Thompson Brook. I do not find this argument of the Claimant's to be persuasive. The case law clearly demonstrates that in order to make a finding of navigability based upon the concept of possible future improvements, the feasability of such improvements must be reasonable. The Claimant offers no direct evidence, testimonial or otherwise, that would tend to demonstrate the Brook could be made navigable. A vague suggestion based upon historical references to past projects in different areas than the subject area and unsupported by any testimonial or documentary evidence is insufficient to meet the reasonableness requirement. Therefore, I find that the evidence does not support a finding that Thompson Brook could be made navigable by improvements to the channel.

In further support that Thompson Brook is a navigable waterway, the Claimant alleges that the Brook is actually part of the New Meadows River, a water-body that all parties concede is clearly navigable. Regarding this argument, I begin by noting that no witness who testified at the hearing specifically stated that Thompson Brook, at the point it crosses the subject property, is a part of the New Meadows River. I further note that Mr. Hawes and Mr. Kamila each testified that both the New Meadows River and the Thompson Brook flow north to south and do not meet until a point

well south of both the subject property and Adams Road. This testimony is supported by the many maps of the area offered by both parties which shows the Brook flowing into Thomas Bay and the Bay then flowing into the New Meadows River. (CX. 18, 21, 21, EX. 23, 31, 32, 35, 57, 58) The New Meadows River then flows south into Cosco Bay, a Bay of the Atlantic Ocean. Therefore, because both the Brook and the River flow north to south, I find that the evidence demonstrates that the New Meadows River and Thompson Brook are separate courses of water until they merge south of the subject property. The portion of the Brook on BIW property is not part of the River and the navigability of the River may not therefore be imputed to Thompson Brook.

The Claimant also argues that Thompson Brook is influenced by the tidal activity of the New Meadows River and is therefore part of that River. A great deal of testimony at the hearing and many exhibits of the parties relate to tidal influence on both the New Meadows River and Thompson Brook. It is undisputed by the Employer that when the Atlantic Ocean is in a high tide phase at Cosco Bay, that there is a resulting high tide effect on the New Meadows River. Seawater flows farther inland, northward into the New Meadows River channel, and mixes with the freshwater running south to the Ocean. In fact, due to the strength of the high tides, the water of the New Meadows River has a very high saline content until several miles north or where river and ocean meet. The testimony of Mr. Kamila establish that this tidal effect reaches all the way to portions of Thompson Brook. Mr. Kamila made several visits to various portions of the Brook during both high and low tide cycles. Based upon his personal observations during these visits he noticed a distinct tidal influence on the Brook at the point it flows under Adams Road. (Tr. 239) He also testified he did not observe a tidal effect on the Brook at the point it crosses BIW property. (Tr. 234) As the opinions are rationally based on the perceptions of Mr. Kamila, they are admissible. Mr. Kamila’s testimony is also corroborated by EBMF2 which shows high salt marsh environments on Thompson Brook south of the BIW property line. (CX. 18) Where the parties in this case differ is as to how far north on Thompson Brook the tidal influence extends.

Mr. Kamila stated that he observed a definite tidal influence on the Brook at the Adams Road culvert during the oceanic high tide phase. (Tr. 239) However, he opined that the tidal influence did not reach as far north as the portion of the Brook flowing across BIW property. (Tr. 234) EBMF 2 demonstrates the presence of high salt marsh and fresh-brackish marsh environments on the Brook south of the subject property. As stated above, the Maine Geological Survey Coastal Marine Geological Environment Map key defines “intertidal” as those environments between the high water datum and

the lowest water datum subject to twice daily tidal flooding and all other marine forces. (CX. 18)

Counsel for BIW argues in brief that tidal activity does not matter for purposes of determining navigability under the LHWCA. Brief for the Employer at p. 8. In support, the Employer cites to the United States Supreme Court Case of Propeller Genesse Chief v. Fitzhugh, 53 U.S. 443 (1851), in which the court stated that admiralty jurisdiction extends to the navigable rivers and lakes of the U.S. without regard to the ebb and flow of the tides. The Court in fact does make this statement in Propeller Genesse Chief, however, I note that that case involved the concept of the extent of sovereignty over a water way as opposed to whether tidal influence effects the definition of navigability. Counsel for BIW is correct, however, that tidal activity alone is not sufficient for a finding of navigability. The Supreme Court held in the Daniel Ball, that for a body of water to be "navigable" it must be navigable in fact, thus rejecting the English common law doctrine that navigability was dependent on tidal flow. 77 U.S. at 563. This continues to be the modern standard used by the federal courts. See United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Holt State Bank, 270 U.S. 49 (1926). "Conversely, the fact that the tide ebbs and flows in a stream does not necessarily tend to demonstrate its navigable character." U.S. v. American Cyanamid Co., 354 F. Supp 1202, 1204 (S.D. N.Y. 1973), *citing,* Mintzer v. North American Dredging Co., 242 F. Supp. 553, 559-61 (N.D.Cal.1916), *aff'd*, 245 F. Supp. 297 (9 Cir. 1917); Chisholm v. Caines, 67 F. Supp. 285, 292 (D.S.C.1894); Van Cortlandt v. New York Central Railroad Co., 139 Misc. 892, 897, 250 N.Y.S. 298, 304-05 (Sup.Ct.West.Co.1931). See also Iowa-Wisconsin Bridge Co. v. United States, 84 F. Supp. 852, 114 Ct.Cl. 464 (1949), *cert. denied*, 339 U.S. 982(1950); Pitship Duck Club v. Town of Sequim, 315 F. Supp. 309 (W.D.Wash.1970).

Reviewing the evidence in the present case, I find that Thompson Brook is tidally influenced to an extent. However, the tidal influence does not extend as far north as the BIW property. The survey conducted by Survey & Geodetic Consultants, Inc. tends to show that the channel depth at the subject property line is above the mean high water mark. (EX. 65) Furthermore, EBMF 2 indicates that the closest intertidal environment is still south of the BIW property boundary. (CX. 18) EBMF 8 shows a 3,400 foot distance from the property line to the mean high tide line on the Brook. (CX. 18) For these reasons, I find that the portion of Thompson Brook located on the subject property is not tidally influenced.

In summary, I find that evidence of record does not support a

finding that Thompson Brook is a navigable waterway of the United States. As navigability is a threshold requirement of 33 U.S.C. §903(a), the Claimant has not established situs as required by the Act and the regulations.

The Claimant further avers that situs is established based upon the theory EBMF "adjoins" the New Meadows River, an undisputed navigable waterway of the U.S. Therefore, the Claimant argues, there is a "functional relationship" between the facility and the River which establishes situs under the Act.

As stated above, the Act provides a remedy to those employees injured at a facility either physically situated upon navigable waters of the United States or adjoining navigable waters. 33 U.S.C. §903(a) Four circuit courts of appeals have addressed the requirements necessary for a finding that a facility adjoins a navigable waterway. The Third, Fifth, and Ninth Circuits uses a "functional approach" in making this determination. See Sea-Land Services, Inc. v. Director, OWCP, 540 F.2d 629 (3rd. Cir. 1976); Texports Stevedores Co. v. Winchester, 632 F. 2d 504 (5th Cir. 1980); Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978). The Fourth Circuit, however, employs a more stringent "contiguity" analysis holding that an area "adjoins" a navigable waterway only if it is "contiguous with" or otherwise "touches" navigable waters. Sidwell v. Director, OWCP, 71 F.3d 1134, 1138 (4th Cir. 1995). The present case arises within the First Circuit and that court has not previously addressed the "adjoining" issue now presented by the parties. BIW advocates that this court adopt the test enumerated by the Fourth Circuit and conversely, the Claimant advocates analysis under the standards established by the Fifth Circuit. The Board however, has consistently affirmed application of the functional relationship approach as enumerated by the Ninth Circuit in Herron in all cases arising outside the Fourth Circuit. Therefore, that method will be used in analyzing the facts of the instant case. See Brown v. Bath Iron Works, 22 BRBS 384 (1989); Bennett v. Matson Terminals, 14 BRBS 526 (1981), *aff'd sub nom.* Motoviloff v. Director, OWCP, 692 F.2d 87 (9th Cir. 1982); Waugh v. Matt's Enterprises Inc., 33 BRBS 9 (1999).[2]

[2] I note however, that the facts of this case clearly do not satisfy the Fourth Circuits Sidwell standard. The New Meadows River is, at its closest point, 1,400 feet east of the subject property and does not physically touch the property. (CX. 18) As discussed above, I have found that Thompson Brook is not part of the River at the point the Brook crosses BIW property. Therefore, no navigable body of water is "contiguous" with EBMF.

Under the functional relationship analysis, property need not be contiguous to a navigable waterway provided four factors are satisfied. Summarizing the elements of Herron, the Board held that an administrative law judge must consider:

1. The suitability of the site for the maritime uses referred to in the statute;

2. Whether adjoining properties are devoted primarily to uses in maritime commerce;

3. The proximity of the site to the waterway; and

4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

Herron, 568 F.2d 137, 7 BRBS at 409; See also Lasofsky v. Arthur J. Tickle Engineering Works, Inc., 20 BRBS 58, 61 (1987), *aff'd mem.* No. 87-3836 (3rd Cir., June 14, 1988); Brown v. Bath Iron Works, 22 BRBS at 387.

Applying these factors to the present case, I find that a functional relationship between EBMF and the New Meadows River has not been established. As is discussed above, EBMF is a facility which pre-fabricates units for later installation aboard ships at the main yard in Bath. No evidence has been presented by the Claimant that this type of manufacturing requires a site particularly suited for maritime uses. Mr. Flanders testified that before EBMF opened there was a small pre-fabrication shop at the main shipyard in Bath. (Tr. 38) Articles from various Bath Iron Works's Logs, an in-house publication for employees, record that both EBMF and the Hardings facility were expansion projects of the Employer. (CX. 26) BIW had outgrown all available space at the main yard in Bath and was forced to move a number of their prefabrication departments to new facilities. It is therefore apparent that EBMF was constructed in Brunswick due to a lack of space at the main yard and not because the Brunswick location had any special characteristic which would be beneficial for the pre-fabrication of ship components. As the Board noted in Brown, "the fact that a situs is used for maritime purposes . . . does not automatically bring it within the coverage of Section 3(a)." Brown, 22 BRBS at 387. Furthermore, as expansion of a company is primarily driven by economic factors, it would appear the decision to locate EBMF in Brunswick was financially motivated rather than a product of maritime suitability considerations.

Moreover, the testimony of Mr. Flanders revealed that once prefabrication of a unit is completed the item is either stored at EBMF or trucked to the shipyard in Bath. Despite the fact that EBMF is located only 1,400 feet from the River, no evidence was offered that the facility makes use of the River in the manufacturing process or in the shipment of goods.

The testimony of Mr. Hawes also demonstrates that property between EBMF and the shipyard is not devoted primarily to maritime commerce. Specifically, residences, a propeller shop, a marina, convenience stores, gas stations, auto-sales businesses and other small businesses may be found between EBMF and the shipyard. (Tr. 94, 95-97) The property located between EBMF and the New Meadows River is also not specifically devoted to the maritime industry. Residences, a commercial greenhouse, and a few small businesses presently occupy the properties separating EBMF from the New Meadows River. (Tr. 92-93) Additionally, Verizon, a telecommunications company, owns and operates a facility on a parcel of property located within the subject parcel. These mixed commercial and residential land uses adjoining EBMF illustrate further that the property is not particularly suited for the maritime uses referred to in the statute. Moreover, because of these mixed, non-maritime land uses on adjoining properties, I find that factor two of the functional relationship test analysis is also not satisfied.

The Claimant argues that because BIW operates other manufacturing facilities on properties to the north and west of the subject property, that the dominate land use in the general vicinity is maritime industry. Therefore, the Claimant avers, element two of Herron is satisfied. The testimony and evidence of record does indeed establish that BIW owns and operated five separate facilities in the surrounding area. However, I find that there are enough non-maritime businesses and private residences within the same general area to deem the area a mixed land use locality. Assuming, *arguendo*, that the Claimant is correct and the four other BIW facilities make the dominant land-use in the area maritime in nature, situs is still not established because the Claimant has failed to demonstrate the other three elements of the Herron analysis.

I also find that relative close proximity of EBMF to the New Meadows is of little consequence in this case. In considering the issue of proximity in Bennett, the Board noted that while the Employer's facility was only 750 feet from a waterway and approximately a half mile to a deep water port, the employer did not make use of the port nor did it own the property between the port and its facility. Bennett, 14 BRBS at 529. As stated above,

BIW does not use the New Meadows River for any purpose or own the land located between the subject property and the River. Therefore, as was the case in Bennett, BIW's close proximity to the River is "merely fortuitous." Id. at 526

Finally, I find that the Claimant has not established that EBMF is as close as feasible to navigable waters. There is no evidence in the record which would tend to support that the subject property is as close as feasible to navigable waters. Nothing in the record indicates that BIW actively sought to locate EBMF in close proximity to the New Meadows River or to the main shipyard as no evidence was presented which would demonstrate that pre-fabrication be done in any particular proximity to a navigable waterway.

Entitlement:

Since the Claimant has failed to establish situs, a requirement of jurisdiction, coverage under the Act has not been demonstrated. As entitlement to benefits has not been established, the Claimant's counsel is not entitled to attorney's fees in this matter.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, IT IS HEREBY ORDERED that the claim for benefits of DAMON E. CUNNINGHAM, JR. is DENIED.

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DANIEL J. ROKETENETZ
Administrative Law Judge